No. 81193-8

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID McCORMICK,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Tomas J. Wynne, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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RULES, STATUTES AND OTHERS (CONT'D)

A. ISSUES PRESENTED IN SUPPLEMENTAL BRIEF

At the time of the trial court hearing, petitioner David McCormick was a 61-year-old indigent disabled man in a wheelchair who Obtained food from the Saint Vincent DePaul food bank in Everett. The record showed McCormick obtained food from this location for years with no problem. In 2006, the community corrections officer (CCO) nonetheless believed this violated suspended sentence conditions directing McCormick to "not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer." CP 46-47.

The trial court found McCormick violated the condition but said it could not find the violation was willful. RP 15-16. The court revoked the suspended sentence and ordered McCormick to serve a 123-month prison term. CP 9-13.

1. Do the due process clauses of the state and federal constitutions require the state to prove a willful violation of community custody conditions before revoking a suspended sentence and imposing 123 months in prison?

2. Was the evidence insufficient to support the trial court's findings supporting revocation of the suspended sentence? CP 9.

B. SUPPLEMENTAL STATEMENT OF THE CASE

On July 31, 2000, the trial court found McCormick guilty and sentenced him to a Special Sexual Offender Sentencing Alternative (SSOSA). The conditions of the SSOSA required McCormick to participate and progress in sexual deviancy treatment, and "not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer." CP 46-47.

In 2006, McCormick was disabled, in a wheelchair, and living on a fixed disability income in Everett. RP 6, 13; CP 22. For years he traveled to the food bank at Saint Vincent DePaul/Immaculate Conception to obtain free food. RP 3, 6-7. Because of his disability, he traveled to the food bank closest to his house. RP 13. He understood his prior CCO had approved this location. RP 6-7, 13.

In March of 2006, the CCO moved to revoke the SSOSA, alleging the Saint Vincent DePaul food bank was located on the property of the Immaculate Conception Grade School.[1] The violation report did not, however, explain the physical layout of the food bank's location in relation to the school. It simply asserted "[a]s churches

[1] The CCO's report was dated March 21, 2006, and filed May 16, 2006. The header has an incorrect date, May 23, 2005. CP 15-18.

and schools are viewed as places where minors are known to congregate, this is a violation of supervision." CP 16.

In his response to the CCO, McCormick denied knowing the food bank was on school property and denied seeing any minors present when he went to the food bank. CP 16.

At the violation hearing held May 16, 2006, the parties argued the disputed question as to the food bank's location in relation to the school. As defense counsel stated, it was not clear the food bank was affiliated with the school. Entrance to the food bank was in an alley. RP 3. "The food bank is separate from the school and does not appear to be located in a school. A road and a large building block the playground from the sight of the food bank." CP 22. Defense counsel stated, "the playground is almost two blocks away. . . . the place where the children congregate, it is really as far away from the food bank as it could be in terms of where it is located next to the school." RP 12.

The CCO asserted the high school was across the street from the food bank. RP 11-12. The food bank was located in the basement of the former convent. RP 8. The state did not prove there are any signs at the food bank that would identify it as affiliated with a school or other place where a minor is known to congregate. Some

classes apparently were held in the upper floors of the former convent, but the state did not show that anyone entering the food bank from the alley would know portions of the former convent were used as a school or an area where minors might congregate.

Defense counsel's affidavit further provided that the food bank was open on Friday morning at 9:00 – 10:20. People line up about 15 minutes early. CP 21. In contrast, parents dropped off children at the school's playground at 7:50. CP 21.

Given this record, it is not surprising the trial court did not find McCormick willfully violated the SSOSA condition. The court instead admitted it did not know whether McCormick was unwilling or unable to follow the SSOSA conditions. RP 15-16. The court nonetheless revoked the suspended sentence and ordered McCormick to serve 123 months in prison. RP 15-16; CP 9-13.

The Court of Appeals affirmed the trial court and denied McCormick's motion for reconsideration. This Court granted review. State v. McCormick, 141 Wn. App. 256, 169 P.3d 508 (2007), rev. granted, 164 Wn.2d 1002 (2008).

C. SUPPLEMENTAL ARGUMENT

1. THE REVOCATION ORDER SHOULD BE VACATED BECAUSE THE STATE FAILED TO PROVE A WILLFUL OR KNOWING VIOLATION OF THE SSOSA CONDITION.

The relevant SSOSA statute allowed a court to revoke a SSOSA only if an offender (a) violates the conditions of the suspended sentence, or (b) fails to make satisfactory progress in a treatment program. Former RCW 9.94A.120(8)(a)(vi) (1999).[2] Otherwise, revocation constitutes an abuse of discretion. State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999).

In Dahl, this Court discussed due process protections in the context of SSOSA revocations. Setting the due process floor beneath which the state may not go, the Dahl court stated

> minimal due process entails: (a) written notice of the claimed violations; (b) disclosure to the parolee of the

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[2] Former RCW 9.94A.120(8)(a)(vi) (1999) provided:

> The court may revoke the suspended sentence at any time during the period of community custody and order execution of the sentence if: (a) The defendant violates the conditions of the suspended sentence, or (b) the court finds that the defendant is failing to make satisfactory progress in treatment. All confinement time served during the period of community custody shall be credited to the offender if the suspended sentence is revoked.

This section was recodified in 2001 as RCW 9.94A.670(10), without substantial amendment.

> evidence against him; (c) the opportunity to be heard; (d) the right to confront and cross-examine witnesses (unless there is good cause for not allowing confrontation); (e) a neutral and detached hearing body; and (f) a statement by the court as to the evidence relied upon and the reasons for the revocation. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). These requirements exist to ensure that the finding of a violation of a term of a suspended sentence will be based upon verified facts. Id. at 484, 92 S.Ct. 2593.

Dahl, 139 Wn.2d at 683; see also, Gagnon v. Scarpelli, 411 U.S. 778, 790, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

Dahl raised notice and confrontation issues in his challenge to the revocation. Dahl, at 684-85 (notice); at 686-87 (confrontation). This Court agreed the trial court erred in failing to permit Dahl to confront the witnesses against him. Because the error undermined the reliability of the trial court's finding, it was not harmless. This Court accordingly reversed and remanded for a new revocation hearing. Dahl, at 686-87.

The Dahl Court did not address whether the state must prove a willful violation of sentence conditions before revoking a suspended sentence. Its concern for reliable determinations of facts before revocation of suspended sentences nonetheless supports McCormick's claims.

McCormick argued, inter alia, the constitution requires the trial court to find the alleged violation was willful. Brief of Appellant (BOA) at 21-25; U.S. Const. amend. 14; Const. art. 1, § 3. McCormick relied on authority from other states holding that basic principles of fairness require the state to prove a willful violation before revoking parole or a suspended sentence. See e.g., Neidlinger v. State, 2007 WY 204, 173 P.3d 376 (Wyo. 2007); Messer v. State, 145 P.3d 457, 460 (Wyo. 2006); Van Wagner v. State, 677 So.2d 314, 316-17 (Fla. App. 1996); State v. Lafferty, 125 Idaho 378, 382, 870 P.2d 1337 (Idaho App. 1994); State v. Alves, 174 Ariz. 504, 506, 851 P.2d 129 (Ariz.App. 1993); People v. Zaring, 8 Cal. App. 4th 362, 10 Cal.Rptr.2d 263 (1992); State v. Williamson, 61 N.C.App. 531, 301 S.E.2d 423, 425 (1983); see also, Kupec v. State, 835 P.2d 359, 362 (Wyo. 1992) ("Revoking the probation of a defendant whose failure to comply with his probation conditions was not willful but instead resulted from factors beyond his control would be fundamentally unfair."); accord, State v. Hodges, 798 P.2d 270 (Utah App. 1990).

McCormick also cited settled due process principles discussed in Bearden v. Georgia, 461 U.S. 660, 672-73, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983) and Smith v. Whatcom County District Court, 147 Wn.2d 98, 52 P.3d 485 (2002). Both cases recognized due process

rights are violated when a state revokes a suspended sentence based on an offender's indigence and inability to pay financial obligations. Where indigence is at issue, the state must establish a willful failure to pay before revoking a suspended sentence. Bearden, 461 U.S. at 672-73; Smith, 147 Wn.2d at 111-14.

McCormick further emphasized the SSOSA condition's plain language, which required the state to establish a knowing violation:

> Do not frequent areas where minor children are known to congregate, as defined by the community corrections officer.

CP 46 (emphasis added). The state's claim would require a court to rewrite the condition:

> "Do not frequent the vicinity of, or be in proximity to, or across the street from, or near areas where minor children ~~are known to~~ congregate, as defined by the Community Corrections Officer."

See Brief of Respondent, at 9 (arguing McCormick was in the "vicinity"), at 14 ("proximity"), at 18 ("proximity," "across the street"), at 24 ("vicinity" and "near"), at 29 ("vicinity").

The Court of Appeals did not cite or discuss the out-of-state case law. The court distinguished the willfulness requirement of Bearden and Smith by asserting those cases are limited to questions of financial ability to pay. The court did not recognize these facts inextricably intertwine McCormick's indigency with the state's alleged

violation. 141 Wn. App. at 262. The Court of Appeals then relied on its decision in State v. Gropper, 76 Wn. App. 882, 885-86, 888 P.2d 1211 (1995), holding "no finding of willfulness was required." 141 Wn. App. at 263.

The Court of Appeals erred for the following reasons.

a. The SSOSA Condition Required the State to Prove a Willful Violation.

First, the Court of Appeals opinion overlooked the SSOSA condition as it was written. Conditions of probation and parole must be sufficiently definite to give the offender notice of the proscribed conduct. State v. Riles, 135 Wn.2d 326, 348-49, 957 P.2d 655 (1998); State v. Sansone, 127 Wn. App. 630, 111 P.3d 1251 (2005). A scienter requirement, like the one in this condition, is important because it can prevent the condition from being unconstitutionally vague.[3]

The condition's plain language required the state to prove McCormick frequented an area "where minor children are known to

[3] See People v. Lopez, 66 Cal. App.4th 615, 628-29, 78 Cal.Rptr.2d 66 (1998) (unconstitutional to prohibit contact with a class of people unless the probationer has knowledge to identify the class); Riles, 135 Wn.2d at 349 (similar condition "applies only to places where children commonly assemble or congregate"), but see, McVey v. State, 863 N.E.2d 434, 449-50 (Ind. App. 2007) (similar condition was unconstitutionally vague).

congregate[.]" CP 46 (emphasis added). By including the knowledge element, the condition required the state to prove a knowing violation. Washington law generally equates proof of knowledge with proof of willfulness. RCW 9A.08.010(4). The Court of Appeals' contrary holding improperly rewrote the condition to remove this element.

The revocation of a suspended sentence should be reversed where the trial court does not find the necessary facts to show the condition was violated. Dahl, 139 Wn.2d at 689-90; former RCW 9.94A.120(8)(a)(vi) (1999). The trial court expressly did not find the alleged violation was willful. RP 15-16. This Court therefore should reverse the revocation order. CP 9-13.

b. Fundamental Fairness Requires the State to Establish a Willful Violation.

Second, as shown by Bearden, Smith, and the case law from other states, it is fundamentally unfair to revoke a suspended sentence for a violation that is not willful.[4]

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[4] In the Court of Appeals, McCormick raised the due process claim and discussed the standard 3-part test set forth in Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Accord, City of Redmond v. Moore, 151 Wn.2d 664, 670, 91 P.3d 875 (2004). McCormick incorporates that argument here. BOA at 21-26 (attached as appendix A).

Revocation hearings involve two basic steps. The first is to decide the "wholly factual" question whether the violation occurred. If the violation occurred, the second step requires the court to determine what should be done to protect society and to improve chances of rehabilitation. Pierce v. Department of Social and Health Services, 97 Wn.2d 552, 558, 646 P.2d 1382 (1982) (citing Morrissey, at 479-80). In determining what process is due, the courts have balanced the probationer's liberty interest and the state's "interest in the rehabilitation of the parolee while ensuring that he commits no additional antisocial acts." Pierce, at 558-59 (citing Morrissey, at 484).

To date, Washington case law has required the state to prove a willful violation when the state seeks to modify or revoke a sentence based on an offender's failure to pay financial obligations.[5] In that circumstance, courts may punish an offender's willful recalcitrance, but not a legitimate inability to pay due to indigence or poverty. Smith, 147 Wn.2d at 111-14; State v. Woodward, 116 Wn. App. 697, 706, 67 P.3d 530 (2003); State v. Peterson, 69 Wn. App. 143, 147, 847 P.2d

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[5] The due process question is one of first impression in Washington. The Gropper court did not address due process, but instead decided that case on statutory grounds. Gropper, 76 Wn. App. at 885-87 (citing former RCW 9.94A.200(2)(c)).

538 (1993); see generally, Bearden v. Georgia, 461 U.S. at 672-73 (probation cannot be revoked for financial violations without a finding of willful noncompliance); Gagnon v. Scarpelli, 411 U.S. 778, 790, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) (same).

The Bearden rule should apply here as well, because the state's violation theory is inseparably intertwined with McCormick's indigence. Simply stated, McCormick went to the food bank because he is indigent. A food bank is, by definition, a place where indigent people acquire donated food. WAC 365-140-030(3) ("'Food bank' means an emergency food program that distributes unprepared food without charge to its clients, is open a fixed number of hours and days each week or month, and such hours and days are publicly posted"). Washington has a policy of providing food assistance to indigent residents. RCW 43.330.130; WAC 365-140-010, 365-140-040, 365-140-050.

In Bearden, the Supreme Court made it clear the state cannot revoke probation for being poor. The state may revoke a suspended sentence only where it establishes a willful refusal to comply with financial obligations. Bearden, 461 U.S. at 668-69; see also, Smith, 147 Wn.2d at 111-12 ("Washington law therefore follows Bearden in

requiring the court to find that a defendant's failure to pay a fine is intentional before remedial sanctions may be imposed").

This case raises the same indigence concerns discussed in Bearden and Smith. McCormick ran afoul of the state's agents because he is indigent and went to a food bank. Before the state may revoke his suspended sentence for that act it must prove he knowingly violated the condition. Otherwise, the state has established nothing more than revocation based on indigence, which Bearden and Smith clearly prohibit.

In this Court the state will almost certainly make efforts to distinguish Bearden. In an oft-cited footnote, the Bearden majority explained the government may not always need to prove scienter or fault before a court may revoke probation. As an example, the court noted that society's need to protect itself from chronic drunken drivers may require revocation of probation "once it becomes evident that efforts at controlling his chronic drunken driving have failed." Bearden, at 668 n.9 (citing Powell v. Texas, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968)). Courts have relied on this to find scienter is not a necessary prerequisite for probation violations. See,

e.g., State v. Hill, 256 Conn. 412, 421, 773 A.2d 931 (2001) (citing note 9 in Bearden).[6]

But where there is nothing inherently dangerous about going to a food bank, the state's interest in protecting society is not triggered unless the violation was willful. Our society does not punish people who are indigent and need assistance in securing food, a basic necessity of life. The Bearden court recognized this in clear terms: "in contrast to a condition like chronic drunken driving, however, the condition at issue here – indigency – is itself no threat to the safety or welfare of society." Bearden, 461 U.S. at 668 n.9.[7] It was not a violation of the SSOSA conditions to get food from a food bank. It was only unlawful to "frequent areas where minor children are known to congregate." CP 46.

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[6] See also, Knight v. Estelle, 501 F.2d 963 (5th Cir. 1974) (insanity defense is not applicable to parole revocation hearing), cert. denied, 421 U.S. 1000 (1978). In Knight, the violation was the commission of another rape the parties conceded was "hideous and . . . undisputed." Knight, 501 F.2d at 963-64. That situation certainly falls within the Bearden example of inherently dangerous conduct.

[7] See also, In re Robert M., 163 Cal. App. 3d 812, 815-17, 209 Cal.Rptr. 657 (1985) (recognizing it is fundamentally unfair to find a juvenile violated a probation condition requiring him to maintain satisfactory grades where he lacked the intellectual capacity to do so and where his violation posed no threat to society).

As McCormick argued in the Court of Appeals, other courts have recognized it is fundamentally unfair to revoke a suspended sentence unless the state shows a willful violation.[8] The fundamental unfairness is further compounded when the state alleges violation of release conditions for an indigent probationer. See generally, Heller, Poverty: The Most Challenging Condition of Prisoner Release, 13 Geo. J. Poverty Law & Pol'y 219, 239. (Summer 2006) (traditional societal safety nets such as welfare, food stamps, and public housing are denied to many convicted offenders).

In the Court of Appeals, the state cited a Connecticut case, asserting McCormick's out-of-state cases were unpersuasive. Br. of Resp. at 16-17 (citing State v. Hill, 256 Conn. 412, 773 A.2d 931 (2001)).[9] In citing Hill, the state theorized McCormick's authority did

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[8] Neidlinger v. State, 173 P.3d at 379; Messer v. State, 145 P.3d at 460; Van Wagner v. State, 677 So.2d at 316-17; State v. Lafferty, 870 P.2d at 1341-42; State v. Alves, 851 P.2d at 506; People v. Zaring, 10 Cal.Rptr.2d at 271-73; State v. Williamson, 301 S.E.2d at 425; Kupec v. State, 835 P.2d at 362; State v. Hodges, 798 P.2d at 270.

[9] Hill was convicted for assaulting his wife. Hill's probation violations arose from more assault charges, his failure to attend multiple scheduled meetings with his parole officer, and his failure to provide urine samples and verification of employment. Hill, 773 A.2d at 934-36. Hill admitted he knew about the meetings and admitted the violations, but argued he thought his attorney was working to modify the meeting schedule. The trial court found he failed to report to the scheduled meetings and revoked his probation. Hill, 773 A.2d at 417.

not distinguish "between financial and non-financial probation violations." Br. of. Resp. at 16. As shown above, however, the state misses the point. Hill did not involve an indigent 61-year-old man in a wheelchair who went to the nearest food bank to get food. Unlike Hill, McCormick's alleged violation unquestionably arose because of indigence. For that reason, to comply with Bearden and fundamental fairness, the state must prove he willfully frequented the food bank knowing minors would congregate there.

McCormick's position is not only supported by Bearden and the out-of-state cases, it creates no parade of horribles. Washington courts already must consider a probationer's mental state when determining whether the state has proved a violation. In State v. Johnson, 9 Wn. App. 766, 770-71, 514 P.2d 1073 (1973), rev. denied, 83 Wn.2d 1006 (1974), the court recognized

> Fundamental fairness – the touchstone of due process – requires that the trial court consider whether the appellant knew the difference between right or wrong at the time the alleged violations of probation occurred, not as a defense to the alleged violations, but to make it possible for the trial court to have all the information necessary to make the judgment justice demands.

On appeal, analyzing Connecticut statutes, the court held there was no requirement for the state to prove a willful violation. Hill, 773 A.2d at 420-21. The Court noted there was no Bearden violation relating to indigency because "no such concern is present in this case and Bearden is not controlling." Hill, at 421.

Johnson, 9 Wn. App. at 771. When properly applied, it should not be difficult for the state to meet this minimally fair standard. See e.g., In State v. Sisemore, 114 Wn. App. 75, 78, 55 P.3d 1178 (2002) (state proved willful violation of no-contact order where evidence showed Sisemore's knowledge of the order and officer's testimony he saw Sisemore walking with the protected party); Edrington v. State, 2008 WY 70, 185 P.3d 1264, 1267 (Wyo. 2008) (state proved willful violation of probation conditions where violator failed to complete a drug treatment program and repeatedly violated program rules).

c. The Error is Prejudicial.

For the above reasons, the state was required to show a willful violation before the SSOSA was revoked. The trial court admitted it could not find McCormick's violation was willful. RP 15-16. Reversal is required. Dahl, 139 Wn.2d at 689-90; see also, Smith, 147 Wn.2d at 114 (habeas corpus is proper remedy where court did not make required finding of willfulness).

2. THE EVIDENCE WAS INSUFFICIENT TO PROVE THE VIOLATION.

The unpublished part of the Court of Appeals decision erred in rejecting McCormick's claim the evidence was insufficient to prove the violation. The Court of Appeals disagreed, reasoning in various places

that the food bank was "associated with" or "across the street from" a church and a school. Slip op. at 7, 9.

The problem with this reasoning is that the condition did not prohibit McCormick from obtaining food at a food bank. It prohibited frequenting areas where minors are known to congregate. The state did not show the food bank was signed or marked as "associated" with a church or school, or that children congregate at the food bank, or that the CCO told McCormick not to go to the food bank. This evidence is not sufficient to prove the violation.

A person who has gone to a Saint Vincent DePaul thrift store may have visited a place "associated" with a church, but he certainly has not gone to church – at least as "church" is customarily defined. Likewise, a person such as McCormick, who picked up food at a food bank, did not "frequent" a church or a school. McCormick picked up food from adult staff. There is a difference between places where minors are "known to congregate" and places where minors might conceivably appear at some point.[10] Because the condition prohibited

[10] "The restriction applies only to places where children commonly assemble or congregate." Riles, 135 Wn.2d at 349.

the former and the state at most proved the latter, the trial court erred in revoking the SSOSA. BOA at 14-19.[11]

Because the evidence was insufficient to support a finding that McCormick violated the SSOSA conditions, the revocation order should be vacated and the violation allegation dismissed. See e.g., Neidlinger v. State, 173 P.3d at 379 (state failed to establish a knowing violation where no notice was given that submitting to a sex offender evaluation also required admission of the alleged conduct); Anderson v. State, 2002 WY 46, 43 P.3d 108, 121 (2002) (vacation required where state failed to establish willful violation).

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[11] McCormick's brief also showed why the evidence was insufficient to support the trial court's determination he had unsuccessfully completed treatment. BOA at 19-21. He incorporates that argument here. Appendix B.

E. CONCLUSION

This Court should reverse the Court of Appeals and vacate the violation order. If this Court agrees with argument 2 and concludes the evidence is insufficient, the remand order should direct the trial court to dismiss the violation allegation with prejudice.

DATED this 19th day of September, 2008.

Respectfully submitted,

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of respondent/appellant/plaintiff containing a copy of the document to which this declaration is attached.

Kathleen Webber Seattle

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name Done in Seattle, WA 8/19/08 Date

APPENDIX A

No. 81193-8

Because the court revoked McCormick's suspended sentence despite the state's failure to prove the alleged violations by a preponderance of evidence, the decision should be reversed and McCormick's SSOSA reinstated.

c. Due Process Requires the State to Establish a Willful Violation Before Revoking a 123-month Suspended Sentence.

As discussed supra, the state failed to prove and the trial court failed to find any alleged violation was willful. CP 9; RP 15. This error violated McCormick's due process rights, because basic principles of due process require the state to prove, and the trial court to find, that a violation is willful before the court may revoke probation or a suspended sentence. U.S. Const. amend. 14; Const. art. 1, § 3; Bearden v. Georgia, 461 U.S. 660, 672-73, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983); Smith v. Whatcom County District Court, 47 Wn.2d 98, 52 P.3d 485 (2002). Other states have held that basic principles of fairness require the state to prove a willful violation before revoking parole or a suspended sentence. See e.g., Messer v. State, 145 P.3d 457, 460 (Wyo. 2006); Van Wagner v. State, 677 So.2d 314, 316-17 (Fla. App. 1996); People

v. Zaring, 8 Cal. App. 4th 362, 10 Cal.Rptr.2d 263 (1992); State v. Williamson, 61 N.C.App. 531, 301 S.E.2d 423, 425 (1983).

To date, Washington case law appears to have only required the state to prove a willful violation when the state seeks to modify or revoke a sentence based on an offender's failure to pay financial obligations. In that circumstance, courts may punish an offender's willful recalcitrance, but not a legitimate inability to pay due to poverty. Smith, 147 Wn.2d at 111-14; State v. Woodward, 116 Wn. App. 697, 706, 67 P.3d 530 (2003); State v. Peterson, 69 Wn. App. 143, 147, 847 P.2d 538 (1993); see generally, Bearden v. Georgia, 461 U.S. at 672-73 (probation cannot be revoked for financial violations without a finding of willful noncompliance); Gagnon v. Scarpelli, 411 U.S. 778, 790, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) (same).

But when the alleged violation does not involve nonpayment of financial obligations, Washington courts, interpreting Washington statutes, have permitted the state to simply prove the fact of the violation. If the violation is established, Washington cases have then allowed the burden to shift to the defense to establish the violation was not willful. Woodward, 116 Wn. App. at 703 (addressing statutory isssue but no constitutional claim); accord,

State v. Gropper, 76 Wn. App. 882, 887-88, 888 P.2d 1211 (1995); State v. Bower, 64 Wn. App. 227, 231-32, 823 P.2d 1171 (addressing financial noncompliance), rev. denied, 119 Wn.2d 1011 (1992).

These cases do not involve the length of sentence in McCormick's situation, nor do they decide this due process claim. McCormick respectfully argues that it is facially unfair and violates due process to revoke a 123-month suspended sentence without finding the person willfully violated a sentencing condition.

Due process requires the government to use standards and procedures that prevent constitutionally unacceptable risks that individuals will erroneously lose their liberty. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); City of Redmond v. Moore, 151 Wn.2d 664, 670, 91 P.3d 875 (2004). Under the Mathews test, the court must balance three concepts in determining whether a state procedure violates due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 325.

Here, the private interest is freedom from bodily restraint, which "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action". Foucha v. Louisiana, 504 U.S. 71, 80, 118 L. Ed. 2d 437, 112 S. Ct. 1780, 1785 (1992). The risk of an erroneous deprivation is unreasonably high; absent proof that a violation is willful, a person's sentence could be revoked on nothing more than a random occurrence completely unrelated to any legitimate punitive or rehabilitative objective. The state also cannot establish any significant or untoward cost for a procedure that simply requires the trial court to decide whether the person willfully violated a sentence condition.

Although Washington courts have appeared to permit the state to shift the burden to the defense when imposing sanctions for financial noncompliance, the potential 60-day sanction for those violations is far less than the 123-month sentence here. RCW 9.94A.634(3)(c). While such burden-shifting might satisfy due process where the potential loss of liberty is 60 days, Mathews requires a different balancing when a person is facing the imposition of 123-months in prison.

In essence, as trial counsel argued below, the failure to find a willful violation equates to strict liability. Where the penalty is this harsh – 123 months – its imposition without a finding of willful noncompliance violates due process. Lambert v. California, 355 U.S. 225, 228, 78 S.Ct. 240, 242, 2 L.Ed.2d 228 (1957) (confinement based on strict liability may violate due process); State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000) (state must establish the offender's knowledge when proving possession of a firearm; strict liability would violate due process); State v. Warfield, 119 Wn. App. 871, 80 P.3d 625 (2003) (state must prove knowing possession when charging possession of an unlawful firearm; strict liability would violate due process). As the Washington Supreme Court stated in Anderson,

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."

Anderson, at 367 (quoting Staples v. United States, 511 U.S. 600, 605, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994)).

For all of these reasons, the trial court erred by revoking the SSOSA without finding a willful violation. This Court should vacate

the revocation order and remand for further proceedings in accordance with its opinion.

2. THE COMMUNITY PLACEMENT CONDITION THAT MCCORMICK AVOID AREAS WHERE MINORS CONGREGATE IS IMPERMISSIBLY VAGUE AS APPLIED TO HIS CONDUCT.

The Fourteenth Amendment and Wash. Const. art. 1, § 3 protect citizens from impermissibly vague penal statutes. State v. Baldwin, 111 Wn. App. 631, 647, 45 P.3d 1093 (2002), aff'd on other grounds, 150 Wn.2d 448 (2003). The vagueness doctrine serves two main purposes. First, it provides citizens with fair warning of what conduct they must avoid. Second, it protects them from arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is void for vagueness if either: (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. State v. Sullivan, 143 Wn.2d 162, 181-182, 19 P.3d 1012 (2001); see also Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) ("laws [must] give the person of ordinary intelligence a

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P.2d 1171, review denied, 119 Wn.2d 1011 (1992) (requiring the court to inquire into the reasons for financial noncompliance and to provide the offender with an opportunity to show that his noncompliance was not willful before revoking probation).

While the evidence might support a violation if the test were one of strict liability, that is not the test. McCormick's SSOSA was revoked simply because of his legitimate presence at a food bank that happened to be in the general vicinity of a different place where children congregate – without showing the willfulness of the violation. Because a SSOSA cannot be revoked on a theory of strict liability, the state's evidence failed to sufficiently prove its allegations. McCormick's suspended sentence should be reinstated.

b. Involuntary Suspension From Treatment Based on a Hearsay Allegation Does Not Constitute a Willful Violation.

When the treatment provider merely learned of the state's allegation, McCormick was involuntarily terminated from the treatment program. CP 14. This, in turn, led the state to move to revoke the SSOSA because McCormick was no longer in

treatment. CP 24. This violation also was not factually established, nor was it willful.

The record instead contains abundant evidence that McCormick had made and continued to make substantial progress in his sexual deviancy treatment. McCormick graduated from sexual deviancy treatment once. CP 33-35. He re-entered treatment willingly and was making progress. Appendix C, D. Moreover, as defense counsel stated at the revocation hearing, "I think [the treatment provider] would be willing to revisit the issue of having Mr. McCormick come to group, depending upon your decision here." RP 14. Furthermore, counsel's unrebutted affidavit showed McCormick had already found another treatment provider. CP 21; RP 14.

McCormick did not voluntarily stop paying, attending or participating in sexual deviancy treatment. The record instead shows one fact: the treatment provider involuntarily terminated him merely because he heard about the CCO's unproved allegations. CP 14. This simply bootstrapped one violation from a separate, unproved allegation. The record therefore does not support a finding that McCormick willfully failed to complete the treatment program.

Because the court revoked McCormick's suspended sentence despite the state's failure to prove the alleged violations by a preponderance of evidence, the decision should be reversed and McCormick's SSOSA reinstated.

c. Due Process Requires the State to Establish a Willful Violation Before Revoking a 123-month Suspended Sentence.

As discussed supra, the state failed to prove and the trial court failed to find any alleged violation was willful. CP 9; RP 15. This error violated McCormick's due process rights, because basic principles of due process require the state to prove, and the trial court to find, that a violation is willful before the court may revoke probation or a suspended sentence. U.S. Const. amend. 14; Const. art. 1, § 3; Bearden v. Georgia, 461 U.S. 660, 672-73, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983); Smith v. Whatcom County District Court, 47 Wn.2d 98, 52 P.3d 485 (2002). Other states have held that basic principles of fairness require the state to prove a willful violation before revoking parole or a suspended sentence. See e.g., Messer v. State, 145 P.3d 457, 460 (Wyo. 2006); Van Wagner v. State, 677 So.2d 314, 316-17 (Fla. App. 1996); People